

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DAVID GUERRERO,) Case No. CV 18-9411-JGB (JPR)
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) Petitioner,) ORDER ACCEPTING FINDINGS AND
) RECOMMENDATIONS OF U.S.
)
) v.) MAGISTRATE JUDGE
)
)
) THERESA CISNEROS, Acting)
)
) Warden,¹)
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)
) Respondent.)
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The Court has reviewed the Petition, records on file, and Report and Recommendation of U.S. Magistrate Judge, which recommends that judgment be entered denying the Petition and Petitioner's motion to expand the record and dismissing this action with prejudice. See 28 U.S.C. § 636(b)(1). On March 23, 2021, almost seven months after the R. & R. was issued, Petitioner retained counsel and on April 23 filed objections to

¹ Petitioner is incarcerated at the California Substance Abuse Treatment Facility, whose acting warden is Theresa Cisneros. See Cal. Dep't of Corr. & Rehab. Inmate Locator, <https://inmatelocator.cdcr.ca.gov> (search by name) (last visited May 28, 2021). Cisneros is therefore substituted in as the proper Respondent. See Fed. R. Civ. P. 25(d); see also R. 2(a), Rs. Governing § 2254 Cases in U.S. Dist. Cts.

1 the R. & R. through him.² Respondent did not respond.

2 **I. Motion to Expand the Record**

3 Petitioner appears to argue that the Court should construe
4 the proposed new exhibits as modifying the Petition's existing
5 ineffective-assistance claims or raising new ineffective-
6 assistance claims and grant him leave to amend the Petition to
7 include them. (See Objs. at 4-6.) But even if the Court were to
8 construe the proposed exhibits as timely modifying the Petition's
9 arguments, it still wouldn't be able to consider the exhibits
10 under Cullen v. Pinholster, 563 U.S. 170, 181-82 (2011), because
11 they were never presented to the state court. Further, if the
12 new evidence placed the Petition's ineffective-assistance claim
13 "in a significantly different and stronger evidentiary posture
14 than it was when the state courts considered it," that would
15 render it unexhausted. Aiken v. Spalding, 841 F.2d 881, 883 (9th
16 Cir. 1988) (per curiam) (as amended) (citation omitted); see
17 Gonzalez v. Wong, 667 F.3d 965, 980 (9th Cir. 2011) (holding that
18 when federal petition included new evidence that wasn't presented
19 to state court, making claim "colorable or potentially

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21 ² On December 8, 2020, Petitioner moved to stay the case under
22 Rhines v. Weber, 544 U.S. 269 (2005), so that he could exhaust a
23 claim that he should be resentenced under Senate Bill 1437. His
24 stay request, which isn't addressed in his counseled objections, is
25 denied because any claim that the state court improperly denied
26 resentencing under SB 1437 would not be cognizable on federal
27 habeas review. See, e.g., Rodriguez v. Corvello, No. CV 20-01832-
28 PA (AS), 2021 WL 1603244, at *2 n.7 (C.D. Cal. Mar. 25, 2021),
accepted by 2021 WL 1600301 (C.D. Cal. Apr. 22, 2021); Cole v.
Sullivan, 480 F. Supp. 3d 1089, 1097 (C.D. Cal. 2020). Further,
any ruling on such a resentencing petition would likely constitute
a "new judgment," triggering an entirely separate limitation
period. See Young v. Cueva, No. CV 20-8304-CJC(E), 2020 WL
8455474, at *2 (C.D. Cal. Oct. 27, 2020).

1 meritorious," "appropriate course" was for petitioner to exhaust
2 newly supported claim in state court).

3 Moreover, as the Magistrate Judge pointed out, the proposed
4 exhibits largely pertain to ineffective-assistance claims
5 Petitioner didn't raise in the Petition (see R. & R. at 12 n.5),
6 and it's unlikely that any new ineffective-assistance claims,
7 which appear to fault counsel for additional miscues not raised
8 in the Petition, would relate back. See Schneider v. McDaniel,
9 674 F.3d 1144, 1152 (9th Cir. 2012) (finding that amended
10 petition asserting ineffective assistance based on counsel's
11 failure to develop intoxication defense did not relate back to
12 original petition's claim that counsel failed to have petitioner
13 evaluated by psychiatrist). And any new claims would also be
14 unexhausted, as the Magistrate Judge explained. (See R. & R. at
15 12 n.5.)

16 Petitioner argues that the Court should consider his
17 unexhausted ineffective-assistance claims because he has shown
18 "cause and prejudice" for any procedural default and is "actually
19 innocent."³ (Objs. at 6-7.) He confuses exhaustion with
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21 ³ A petitioner asserting his actual innocence must show that
22 "it is more likely than not that no reasonable juror would have
23 convicted him in the light of the new evidence" presented in his
24 habeas petition. Schlup v. Delo, 513 U.S. 298, 327 (1995). But
25 Petitioner's actual-innocence argument doesn't appear to be based
26 on any new evidence but rather on his contention that he "merely
27 . . . passed" one of his codefendants a gun "without any knowledge
28 of what [he] intended to do with it" and was inside his house at
the time of the shooting. (Objs. at 13; see id. at 11 (citing
Lodged Doc. 13, Augmented Clerk's Tr. at 3-4).) But as the
Magistrate Judge observed, although Petitioner's girlfriend
initially told detectives he didn't leave the house after giving
his codefendant a gun (see Lodged Doc. 13, Augmented Clerk's Tr. at

1 procedural default. Although the Supreme Court has recognized
2 that a petitioner's actual innocence may "overcome various
3 procedural defaults," McQuiggin v. Perkins, 569 U.S. 383, 392-93
4 (2013) (listing such procedural bars), the failure to comply with
5 28 U.S.C. § 2254(b)(1)'s exhaustion requirement is not among
6 them. See, e.g., Sermeno v. Spearman, No. 2:14-cv-2729 DAD P.,
7 2015 WL 4910500, at *3 n.2 (E.D. Cal. Aug. 17, 2015), modified on
8 reconsideration by 2016 WL 6891744, at *3 (E.D. Cal. Nov. 23,
9 2016) (noting that argument similar to Petitioner's impermissibly
10 "combines two separate doctrines" of habeas law). Indeed, a
11 federal habeas court can consider an unexhausted claim only if it
12 is not even "colorable" and must therefore be denied. Cassett v.
13 Stewart, 406 F.3d 614, 621 n.5, 623-24 (9th Cir. 2005) (noting
14 that "exhaustion requirement is distinct from the procedural
15 default rules").

16 **II. Gang Evidence**

17 Petitioner argues that the Magistrate Judge erred in finding
18 that the court of appeal's rejection of his claim that the trial
19 court improperly admitted "cumulative, inflammatory, and
20 irrelevant gang evidence" was not objectively unreasonable.

21
22 3-4), she subsequently acknowledged that he did (see Lodged Doc.
23 11, Clerk's Tr. at 107). All her varying statements were presented
24 to the jury. (See Lodged Doc. 14, 7 Rep.'s Tr. at 1864-72, 1899-
25 903.) He also maintains that the evidence reflected that it was
26 "more likely than not" that the gun used to shoot the victim
27 belonged to Danny Guerrero, another gang member. (Objs. at 13.)
28 But the evidence of that was also before the jury (see Lodged Doc.
5 at 2-6), which nonetheless convicted Petitioner. Thus, his
actual-innocence claim is in any event woefully inadequate to
excuse any procedural failings.

1 (Objs. at 9; see id. at 8-11.) Specifically, he contends that
2 the challenged gang evidence was prejudicially cumulative of
3 other prosecution evidence. (See id. at 9-11.) But as the
4 Magistrate Judge explained, evidence that Petitioner and his
5 codefendants and the victim were members of rival gangs that were
6 at war at the time of the shooting and that Petitioner was
7 present during an earlier shooting involving the gangs was
8 directly relevant to his motive and to showing that the murder
9 was committed for his gang's benefit, which the prosecution had
10 to establish to prove the gang enhancement. (R. & R. at 20-22.)
11 Without that evidence, the jury would have been left without much
12 context for why he and his codefendants murdered the victim.
13 Further, for the reasons detailed in the R. & R., any undue
14 prejudice was mitigated by the prosecutor's arguments and the
15 court's instructions (see R. & R. at 22-23), and any error was
16 harmless (see id. at 25-26).

17 Petitioner also contends that in finding that testimony that
18 police recovered eight guns and ammunition from Danny Guerrero's
19 apartment was "relevant to . . . dispelling the impression that
20 because one of the murder weapons was found in [Guerrero's]
21 possession, he must have been involved in the crime" (R. & R. at
22 24-25 (quoting court of appeal)), the Magistrate Judge
23 effectively "approv[ed] of the state court prohibiting Petitioner
24 from presenting a defense at his trial." (Objs. at 10.) The
25 Magistrate Judge did no such thing, and Petitioner does not
26 explain himself. Nothing prevented him from advancing a theory,
27 as he does in his Objections, that Danny Guerrero was the actual
28 shooter. (See id. at 13.) But as the Magistrate Judge

1 recognized, the prosecution was entitled to introduce evidence
2 undermining that inference by showing that he was simply the
3 gang's armorer. (See R. & R. at 24-25.)

4 **III. Jury Instruction**

5 Petitioner argues that the Magistrate Judge erred in finding
6 that the state court reasonably denied his instructional-error
7 claim; according to Petitioner, any error was not harmless. (See
8 Objs. at 13.) But the Magistrate Judge didn't simply find that
9 any error was harmless because Petitioner's conviction was
10 subsequently reduced from first- to second-degree murder. (See
11 id.) Even though that was a proper consideration, see Torres v.
12 Peery, No. 2:16-cv-0385 MCE DB P, 2018 WL 3197903, at *11 (E.D.
13 Cal. June 26, 2018), she also properly found that "viewed in the
14 context of the overall charge, . . . it was not reasonably likely
15 the jury convicted Petitioner without deciding that he bore the
16 requisite state of mind to commit murder." (R. & R. at 31-32.)

17 **IV. Ineffective Assistance of Counsel**

18 Petitioner reiterates the Petition's arguments that trial
19 counsel was ineffective "for failing to prepare for trial."
20 (Objs. at 13; see id. at 17-18.) For the reasons discussed in
21 the R. & R., he has not established that counsel performed
22 deficiently or that any deficient performance was prejudicial.
23 (See R. & R. at 39-49.) For instance, he claims that counsel
24 failed to "produce significant, exculpatory witness testimony
25 including alibi testimony." (Objs. at 18.) But as the
26 Magistrate Judge observed, the five witnesses that trial counsel
27 allegedly failed to call because of the limited time she had to
28 prepare for trial (nine months) all testified at his first trial,

1 in which he was convicted. (See R. & R. at 44.) Counsel also
2 explained that she had made a tactical decision not to call
3 Petitioner's alibi witness because he wasn't credible (see id.);
4 and another witness he claims she should have called testified at
5 his first trial that he, the witness, was not even present at the
6 shooting, undermining his earlier statement to police that
7 Petitioner wasn't involved (see id. at 45-46). Finally, as the
8 Magistrate Judge found, although Petitioner faults counsel for
9 failing to adequately investigate his case, he doesn't identify
10 any exculpatory information additional investigation would have
11 produced. (See id. at 46-49.)

12 **V. Sentencing**

13 Petitioner argues that the Magistrate Judge incorrectly
14 found that he was not entitled to habeas relief on his sentencing
15 claim, pointing out that had trial counsel appealed from his
16 September 19, 2017 resentencing, as Petitioner claims without
17 evidence he asked him to do, he would have been able to seek
18 resentencing under Senate Bill 620. (Objs. at 18.) But he does
19 not challenge the Magistrate Judge's finding that his sentencing
20 claim "involves only state sentencing law and thus does not give
21 rise to a federal question" (R. & R. at 49), which is reason
22 alone to deny it, and he never raised the appeal issue as part of
23 his ineffective-assistance claim.

24 Having reviewed de novo those portions of the R. & R. to
25 which Petitioner objects, the Court agrees with and accepts the
26 findings and recommendations of the Magistrate Judge. IT
27 THEREFORE IS ORDERED that judgment be entered denying the
28 Petition and Petitioner's motions to expand the record and for a

1 stay and dismissing this action with prejudice.

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3 DATED: June 11, 2021


4 JESUS G. BERNAL
5 U.S. DISTRICT JUDGE
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